*** THE HON'BLE SRI JUSTICE GODA RAGHURAM**

+ WRIT PETITION No. 5445 of 2007

%Dated 16th day of March, 2007

#D. Srikanth, s/o Sri D.K. Rama Rao,
Aged about 38 years, Occup: Business,
R/o. B27/F2, Vidyanagar, Hyderabad.

…. PETITIONER

VERSUS

$ 1. Industrial Development Bank of India,
115, Anna Salai, Saidapet, Chennai-600 015,
Rep. By its Authorized Officer.
2. M/s. Stressed Assets Stabilization Fund
115, Anna Salai, Saidapet, Chennai-600 015,
Rep. By its Authorized Officer.
3. M/s. Excel Monuments Ltd.,
2-2-20/15, D.D. Colony,
Bagh Amberpet, Hyderabad.

.....RESPONDENTS

@ Counsel for Petitioner: Sri M/s. C. Raghu, T. Rajinikanth Reddy.

^ Counsel for Respondents: --.

< GIST:

> HEAD NOTE:

? Cases referred:

1. Civil Appeal No. 908 of 2006 Dt. 29-11-2006 on the file of the Supreme Court of India.

HON'BLE SRI JUSTICE GODA RAGHURAM

W.P.NO. 5445 OF 2007

DATED: 16.3.2007

Between:

D. Srikanth

… Petitioner

and

Industrial Development Bank of India and others

… Respondents

HON'BLE SRI JUSTICE GODA RAGHURAM

W.P.NO.5445 OF 2007

ORAL ORDER:

The petitioner is a guarantor and a Director of the 3rd respondent, a principal borrower, who had defaulted on a liability to the 1st respondent-bank. He assails a letter dated 9.3.2007 issued by the 2nd respondent, invoking the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'), in respect of an issue pending consideration before the Debts Recovery Tribunal, Hyderabad (for short 'the Tribunal') in O.A.No.308 of 2000.

The 1st respondent filed O.A.No.308 of 2000 before the Tribunal for recovery of an amount of Rs.5,79,21,207/- against the 3rd respondent. The petitioner is also a respondent to the O.A. since he had executed a guarantee agreement in respect of the loan availed by the 3rd respondent-company. According to the petitioner, some

pleadings have been filed in the O.A. and the O.A. is pending adjudication before the Tribunal. In the O.A., the 1st respondent-bank had filed I.A.No.247 of 2001, seeking appointment of a receiver for taking possession of the property mortgaged to the 1st respondent and for sale of the same. The Tribunal appointed an advocate commissioner by the orders dated 5.9.2001 and the advocate commissioner/receiver took possession of the properties. The Tribunal had directed the receiver to take all necessary steps for selling the properties. No sale has however taken place, as yet.

On 30.8.2006, the 2nd respondent issued a notice under Section 13 (2) of the Act to the petitioner, intimating that under an agreement dated 30.9.2004, the 1st respondent has sold, assigned and transferred to the 2nd respondent the security and all the rights and obligations in relation to the transaction between the petitioner and the 3rd respondent; that the 2nd respondent is thus authorized to exercise all the rights of the 1st respondent (in terms of the provisions of Section 5 of the Act); and that the petitioner and the 3rd respondent should pay the stipulated amount within the stipulated period, failing which further proceedings under Section 13 of the Act would follow.

The 1st respondent also filed an interlocutory application in O.A.No.308 of 2000 on 25.1.2007 for advancement of the hearing of the O.A. It is pleaded that the Tribunal had listed O.A.No.308 of 2000 on 12.2.2007, for a further process of adjudication. It is also alleged

that the 1st respondent did not move any application in O.A.No.308 of 2000 for either withdrawal of the O.A. or withdrawal of the earlier order in I.A.No.247 of 2001, whereunder a commissioner/receiver was appointed to take possession of the secured assets.

While so, the impugned notice dated 9.3.2007 was addressed by the 2nd respondent to the advocate commissioner/receiver, who is i n ***custodia juris,*** the secured assets, pursuant to the order in O.A.No.308 of 2000, in I.A.No.247 of 2001. The notice dated 9.3.2007 calls upon the advocate commissioner to handover the secured assets to the 2nd respondent since a petition was filed before the Tribunal by the 1st respondent, seeking withdrawal of the advocate commissioner's warrant and was allowed by the Tribunal on 12.2.2007. The notice further states that as the 3rd respondent and the petitioner, as the principal borrower and the guarantor failed to discharge the liabilities due to the 1st respondent and the debt was assigned to the 2nd respondent, the 2nd respondent has decided to proceed further under the provisions of the Act and therefore the advocate commissioner must handover possession of the secured assets to the 2nd respondent. A copy of this notice is marked to the 3rd respondent and the petitioner.

Sri C. Raghu, the learned counsel for the petitioner, contends that having initiated proceedings under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the 1993 Act') by way of O.A.NO.308 of 2000, two years prior to the

coming into force of the Act and as the said proceedings are pending adjudication before the duly constituted Tribunal under the provisions of the 1993 Act, the 1st respondent is disabled and consequently the 2nd respondent too, to proceed under the provisions of the Act. The learned counsel admits that on the assignment of the rights of the 1st respondent to the 2nd respondent and on the due acquisition of such right and interest in the financial assets by the 2nd respondent (under an agreement entered into between these respondents for the said purpose in accordance with the provisions of Section 5 of the Act), the 2nd respondent steps into the shoe of the 1st respondent and inherits all the rights the 1st respondent had, including the right to pursue remedies under the provisions of the Act.

The statutory position in this regard is clear. Section 5 (2) of the Act ordains that where the bank or a financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the Securitisation company or the reconstruction company, such Securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

The right of the 2nd respondent to step into the position of the 1st respondent and pursue proceedings under the provisions of the Act, is therefore incontestable. The provisions of Section 5 (2) of the Act are

clear on this aspect.

Section 5 (4) of the Act reads:

> ***"If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the Securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be."***

Section 13 (1) of the Act, fortified by a ***non obstante*** provision ***qua*** Sections 69 and 69 A of the Transfer of Property Act, 1882, enjoins that any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of the Act. Under sub-section (2) of Section 13, where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of a secured debt or any instalment thereof and his account in respect of such debt is classified by the secured creditor as a non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within 60 days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights

under Section 13 (4) of the Act.

Such a notice has been issued to the petitioner on 30.8.2006. This is the admitted position. What is impeached by the petitioner however is the entitlement of respondents 1 or 2 to initiate proceedings under the Act, including the issuance of a notification under Section 13 (2). According to the petitioner, the 2nd respondent cannot invoke the provisions of the Act, in view of the pendency of O.A.No.308 of 2000.

Section 35 of the Act explicates the paramouncy of the provisions of the Act over other laws. It provides that the provisions of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

Section 37 of the Act is to the effect that the application of the other laws is not barred and accordingly the provisions of the Act shall be in addition to and not in derogation of the provisions of the 1993 Act.

A creditor has a plurality of choices. He may pursue remedies for recovery of his debt under the provisions of the 1993 Act or take recourse to the speedier remedy under the provisions of the Act. Even in a threshold situation, after the coming into force of the provisions of the Act, such a choice is not extinguished, to seek remedies under the provisions of the 1993 Act or the Act. As the ***dominus litus,*** a creditor has the choice of forum subject to jurisdictional constraints of tribunals constituted under the provisions of the 1993 Act.

In case on hand, the 1st respondent had initiated processes under the provisions of the 1993 Act, by way of O.A.No.308 of 2000. The provisions of Section 5 (4) are only to the effect that any suit, appeal or other proceeding relating to a financial asset pending by or against the bank or financial institution shall not abate or be discontinued or be in any way prejudicially affected by reason of the acquisition of financial asset by the Securitisation company or reconstruction company but such suit, appeal or proceeding may be continued, prosecuted and enforced by or against the Securitisation company or reconstruction company, as the case may be. This provision only means on a textual (preferred rule) interpretation that the entering into an agreement for acquisition of the financial asset by the second respondent from the 1st respondent ***per se*** would not prejudicially affect the continuance of O.A.No.308 of 2000. Having regard to the transference to the 2nd respondent of the rights of the 1st respondent in view of the specific legislative presents of Section 5 (2) of the Act), the 2nd respondent is entitled to continue pursuing adjudication O.A.No.308 of 2000. In any event, it is only an enabling power. There is no constraint either on the 1st respondent or the 2nd respondent to proceed with O.A.No.308 of 2000. They may formally withdraw or abandon the proceedings. Insofar as the provisions of the Act are concerned, no provision constrains either the respondent No.1 or respondent No.2 to pursue till conclusion O.A.No.308 of 2000, nor do the provisions of the Act either expressly or by any compelling

implication disable these respondents from pursuing remedies under the provisions of the Act, solely on account of the earlier initiation of proceedings under the provisions of the 1993 Act, by way of O.A.No.308 of 2000. The ***non obstante*** legislative expressions in Sections 5 and 35 of the Act, fortify this view.

The learned counsel for the petitioner would alternatively contend that from the provisions of Section 13 (10) of the Act, it must be inferred that once a proceeding under the provisions of the 1993 Act are initiated, remedies under the provisions of the Act are excluded.

Sub-section 10 of Section 13 enacts that where the dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed, to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower. The provisions of sub-section 10 of Section 13 are in the nature of ***ex abundanti cautela*** explication of a normative right.

There are only certain classes of assets, which are governed by the provisions of the Act. For instance, Section 31 sets out classes of assets, which may generically be classified as financial assets, but are outside the provisions of the Act. Section 31 enacts that the provisions of the Act shall not apply to assets enumerated in Clauses (a) to (j) of

Section 31. All the assets enumerated in Section 31 of the Act are assets against which normally a creditor may proceed for recovery of the amounts due to him. Section 31 of the Act merely excludes these assets from the purview of the stringent provisions of the Act. Section 13 (10) of the Act reiterates the position that after recourse to the provisions of the Act and the possession and sale of the secured assets(which can be proceeded against under the provisions of the Act), if there is yet an outstanding liability due to the creditor, a bank or a financial institution, the bank or financial institution may pursue appropriate remedies either under the provisions of the 1993 Act or before the civil court of competent jurisdiction for recovery of the balance liability. Section 13 (10) neither expressly nor by any compelling implication of language, text or purpose, enact a clog on a secured creditor's right to pursue the remedies explicated under sub-sections (2) and (4) of Section 13 of the Act.

In ***TRANSCORE V. UNION OF INDIA (Civil Appeal No.908 of 2006 dated 29.11.2006),*** while dealing with a similar question as to whether withdrawal of O.A., in terms of the 1993 Act, is a condition precedent to taking recourse to the Act, the Apex Court negatived the plea that remedies under the Act would be excluded.

I n **Transcore (supra)** the respondent-Bank- the Indian Overseas Bank filed O.A.No.354 of 1999, in March 1999 before the DRT-Chennai for recovery of dues, **Transcore** disputed the claim**.** The Bank filed an application in the O.A to bring the properties to sale. The application is pending. While so on 06-01-2003 the Bank issued a

notice under Sec.13(2) of the Act. On 11-01-2004 Sec.19(1) of the 1993 Act was amended by Act 30 of 2004 introducing a provision enabling a Bank or financial institution to withdraw the application whether made before or after the enforcement of the Security Interest and Recovery of Debts Laws(Amendment) Act,2004, with the permission of the DRT, for the purpose of taking action under the Act. On 08-01-2005 the Bank issued a possession notice under Sec.13(4) of the Act, in furtherance of the earlier notice dated.06-01-2003 [issued under Sec.13(2)]. **Transcore** contended that the Bank could not have invoked the provisions of the Act including under proviso to Sec.19(1) without prior permission of the Tribunal before which O.A.354 of 1999 was pending. After a detailed analysis of the provisions of the 1993 Act and of the Act, the Apex Court held:

> ***" Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation, which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/fi; needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor. The question still remains as to the object***

behind insertion of the three provisos to Section 19(1) of Recovery of Debts Due to Banks and Financial Institutions Act 1993 vide amending Act 30 of 2004. The DRT is a tribunal, it is the creature of the statute, it has no inherent power which exists in the civil courts. Order XXIII Rule 1 (3) CPC states inter alia that where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim then the civil court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw the entire suit or such part of the claim with liberty to institute a fresh suit in respect thereof. Under Order XXIII Rule 1 (1)(4),(b), in cases where a suit is withdrawn without the permission of the court, the plaintiff shall be precluded for instituting any fresh suit in respect of such subject matter. Order XXIII Rule 2 states that any fresh suit instituted on permission granted shall not exclude limitation and the plaintiff should be bound by law of limitation as if the first suit had not been instituted. Order XXIII Rule 3 deals with compromise of suits. It states that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith. The object behind introducing the first proviso and the third proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 is to align the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act 1993, the NPA Act and Order XXIII CPC. Let us assume for the sake of argument, that an O.A is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non-disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT Act. One cannot lose sight of the fact that even an application for withdrawal/leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the

account becomes non-performing. Therefore, the bank/FI is required to move under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity. For the above reasons, we hold that withdrawal of the O.A pending before the DRT under the Recovery of Debts Due to Banks and Financial Institutions Act 1993 is not a pre-condition for taking recourse to NPA Act. It is for the bank/fi to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw."

On the aforesaid analysis and in view of the binding precedent supra, this court finds no infirmity either in the notice dated 30.8.2006, issued by the 2nd respondent against the 3rd respondent and the petitioner, purportedly under Section 13 (2) of the Act, nor in the notice dated 9.3.2007, directing the advocate commissioner to deliver to it the assets taken possession of pursuant to the orders of the Tribunal in O.A.No.308 of 2000.

The writ petition is misconceived and is accordingly dismissed at the stage of admission. This Court placed on record its appreciation of the conduct of Sri C. Raghu, the learned counsel for the petitioner who, during the course of pronouncement of this judgment in the court, has very fairly brought to my notice the decision in **Transcore (supra)**. There shall be no order as to costs.

GODA RAGHURAM, J

Date: 16.3.2007

CVM/TSNR